United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products From Japan (DS184)

Closing Statement of the United States
First Meeting of the Panel
August 23, 2000

Thank you Mr. Chairman. This is Mr. McInerney from the Department of Commerce.

I would note at the outset that, in its closing statement, Japan has chosen not to address any of the specific substantive issues in this case, but instead has returned to its efforts to persuade the Panel that all of the Department's actions should be viewed as part of a conspiracy to treat Japan unfairly. Japan wants this Panel to regard the United States' repeated resort to its legitimate remedies under the WTO Agreement to redress repeated dumping by Japan as an abuse of antidumping measures. But it is no abuse to resort repeatedly to antidumping remedies in the face of repeated dumping. Every time that Japan has trouble in its own market, it seeks to export the problem to the United States. Repeated resort to WTO remedies in the face of such repeated dumping is perfectly legitimate and exactly what the Agreement provides for. This case does not involve a conspiracy. As Japan has acknowledged, it involves substantial dumping in massive quantities.

The AD Agreement is a set of agreed limitations on the exercise of AD remedies. The question before this Panel is whether any of the Department's specific methodologies or applications of which Japan complains in fact exceed those agreed limitations. I will now briefly turn to those specific issues.

First, with regard to facts available, we will await further submissions from Japan to see whether they have revised their absolute position on this issue, taken in their first written submission, that adverse inferences are never permitted. This interpretation would encourage exporters NOT to cooperate in AD investigations, rather than to cooperate, as so plainly intended by Article 6.8 and Annex II.

I would also encourage the Panel to recall that the Department's approach to applying facts available proceeds through three distinct steps: whether a resort to facts available is necessary, whether the selection of adverse facts available is justified, and, finally, if an adverse inference is to be employed, the selection of the specific adverse facts available. Japan has repeatedly collapsed these three steps, so as to imply that, if the last step -- selection of the specific adverse facts available -- was impermissible, the entire decision to resort to facts available was also impermissible. This is incorrect. I hope that the Panel will keep these distinctions in mind in considering this issue.

With regard to both the joint venture (CSI) and the two companies that did not submit conversion factors in a timely manner, there is a common thread - - passive resistance, rather than cooperation. These two concepts are worth pausing to consider. First, what is cooperation? The Oxford English Dictionary says (approximately) that cooperation is "acting together for a common purpose." How does this differ from passive resistance? I think the most obvious example with which we are all familiar is the difference between a good secretary and a bad secretary. A good secretary works with you to accomplish the same purpose, without having to be told in detail how each step in this process is to be accomplished. It is only necessary to tell her where you are going, and she helps you get there. A bad secretary does not outright refuse to cooperate. She does not want to get fired, just as an uncooperative respondent does not want to have facts available applied to it. Instead a bad secretary drags her feet - - needing to be prodded at each step, and requiring extremely specific instructions. Occasionally, she will offer excuses along the line of "you didn't tell me you wanted a stamp on the envelope."

This is a subjective line, but I think we all know from our everyday experience what I am talking about. And the behavior of the Japanese companies in this case with regard to the issues in dispute falls into the category of passive resistance, not cooperation. This is an especially effective strategy for them because they control all of the information necessary to conduct the investigations. Their approach was to limply go through the motions, with the Department of Commerce supposedly obliged to tell them at every stage not only what was required, but how to get it. The Panel is supposed to believe that KSC cannot make greater efforts to secure the cooperation of a JV of which it controls 50%, and that NKK and NSC cannot calculate the weight of the steel they produce. Half-heartedly going through the motions to generate a few pieces of paper for the file is NOT cooperation. We all know the difference.

Finally, the Department's selection of facts available is not punitive. It is based on the reasonable inference that the information withheld is less favorable to the respondent than other information on the record. The Department's practice is only designed to give the respondent the incentive to cooperate, by placing it in a position where it will obtain a better result by cooperating. Even adverse facts available are only presumptively adverse. The Department cannot know whether the facts selected are actually adverse, because it does not know the true facts.

With regard to "all others rates," again, we are not entirely clear on Japan's position. Japan originally seemed to be saying that all portions of facts available must be removed from margins used to calculate the all-others rate. This position is untenable because it reads "margins" in Article 9.4 as "parts of margins." On the other hand, if Japan means that all margins that contain even a slight component of facts available must be excluded, then there very often will be NO all-others rate. This result is unacceptable.

The EC seemed to be searching for some middle ground, without any success. This is because Article 9.4 provides no such middle ground. In any event, the EC's 99% facts available hypothetical is unrealistic. When a company's submission is mostly flawed, the Department throws out the whole response and resorts to full facts available. Such margins are not used to calculate the all-others rate.

A final element in some of the arguments we heard today was that companies that did not participate in the investigation should not be punished for the non-cooperation of the participants. We have two objections to this argument. First, as I have noted, we cannot be sure that the non-participants are really being punished, because we cannot know that the facts available selected are actually adverse. Second, to exclude all margins that are nominally based on facts available from all-others rates would reward non-participants for the non-cooperation of participants.

With regard to the 99.5% test, I would first note that there is every reason to regard sales to related parties as presumptively outside the ordinary course of trade. This is a very fair reading of the Agreement and certainly cannot be considered to be inconsistent with the Agreement. I would also like to emphasize again that, if a reseller passes the 99.5% test, all of that resellers' sales - - both above and below its average selling price - - are used.

Japan has attacked the Department's exception to that rule, on the basis that it imposes a floor, but not a ceiling on prices treated as being in the ordinary course of trade. But this is just what the cost-of-production test does - - it treats sales *below* COP as being outside the ordinary course of trade, but sales *above* COP as usable sales for the purpose of calculating normal value. This is consistent with the whole logic of dumping. Where dumping is occurring, it is precisely because high-priced sales in the home market are, in fact, ordinary. Discarding such sales as aberrations would mask dumping.

The simple fact is that Japan does not want the United States to use its home-market sales, presumably because it has a protected home market that ensures high-prices in that market. This is what is behind Japan's desperate attempt to argue that related-party resales in the home market do not fall within Article 2.1's requirement for "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Japan would like to have all of its dumping margins in the United States calculated by comparing its export prices to the United States to its export prices to Canada - - an approach calculated to find no dumping.

Acceptance of Japan's argument that related-party resales in the home market may not be used to determine normal value would encourage foreign producers to manipulate normal value by making *all* their home-market sales through related parties. This would be easy to arrange, and would force investigating authorities to use third-country sales or constructed value in every case - - a result plainly not intended by the Agreement.

So, in reviewing this issue, I would urge the Panel to keep in mind not only the individual pieces of Japan's argument, but the overall design of that argument - - to force the Department to base normal value on prices to third countries or on constructed value, rather than on prices in Japan.

Finally, with regard to critical circumstances, I would like to point out that, during the course of this hearing, we seem to have heard in great depth and detail about every provision in Article 10 *except* Article 10.7, which is the provision pursuant to which the Department acted in making its preliminary determination of critical circumstances. This case is not about whether the United States could have collected final duties retroactively, for the simple reason that the United States did not collect such duties, and agrees that it cannot do so. It is about what effectively were preliminary measures taken to preserve the *option* of collecting such retroactive duties, if all of the conditions of Article 10.6 were met in the final determination.

I would like to thank the Panel again for its consideration. My colleague from the U.S. International Trade Commission will now present the closing statement for the United States on the issues relating to injury.

I will now pick up on Mr. McInerney's issue-by-issue approach. I will look at two issues: whether the captive production provision is consistent with the Antidumping Agreement and whether the USITC's determination in this case was based on objective evidence.

The captive production provision permits a better understanding of the effects of dumped imports on the domestic industry because it directs the USITC to primarily focus on the merchant market, where competition occurs. This provision, despite Japan's argument to the contrary, requires the USITC to consider both the merchant market and the entire industry when making this assessment.

In this case, the captive production provision was not outcome-determinative because there was a 3-3 split among the Commissioners as to whether the provision applied, but all the Commissioners made an affirmative determination. In any event, those Commissioners that applied the provision properly analyzed the merchant market data because they looked at it in addition to the data for the industry as a whole. Looking at the market in this way, the USITC objectively considered the volume, price, and impact of those imports on the domestic industry over the period of investigation, ensuring not to attribute injury from other causes to those imports.